

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MICHAEL JOHN TAYLOR,

Plaintiff,

v.

MICHAEL J. ASTRUE,
Commissioner of Social Security,

Defendant.

No. CV-09-178-JPH

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT AND DENYING
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT

BEFORE THE COURT are cross-Motions for Summary Judgment. (Ct. Rec. 14, 16.) Attorney Jeffrey Schwab represents plaintiff; Special Assistant United States Attorney Benjamin J. Groebner represents defendant. The parties have consented to proceed before a magistrate judge. (Ct. Rec. 8.) After reviewing the administrative record and briefs filed by the parties, the court **DENIES** plaintiff's Motion for Summary Judgment and **GRANTS** defendant's Motion for Summary Judgment.

JURISDICTION

Plaintiff Michael Taylor (plaintiff) protectively filed for disability income benefits (DIB) and supplemental security income (SSI) on January 18, 2006. (Tr. 64, 138, 382.) Plaintiff alleged an onset date of November 2, 2005. (Tr. 64, 383.) Benefits were denied initially and on reconsideration. (Tr. 34, 38, 374, 377.) Plaintiff requested a hearing before an administrative law judge (ALJ), which was held before ALJ Richard A. Say on January 16, 2008. (Tr. 396-423.) Plaintiff was represented by counsel and testified at the hearing. (Tr. 398-418.) Vocational expert Debra Lapoint also testified. (Tr. 418-21.) The ALJ denied benefits (Tr. 16-26) and the Appeals Council denied review. (Tr. 4.) The matter is now

1 before this court pursuant to 42 U.S.C. § 405(g).

2 **STATEMENT OF FACTS**

3 The facts of the case are set forth in the administrative hearing transcripts, the ALJ decisions, and
4 the briefs of plaintiff and the Commissioner, and will therefore only be summarized here.

5 Plaintiff was 40 years old at the time of the hearing. (Tr. 398.) He graduated from high school.
6 (Tr. 398.) Plaintiff has work experience as a tank commander in the U.S. Army, a waiter/bartender, and
7 in ground operations for airlines. (Tr. 126.) Plaintiff testified that he became disabled in November 2005
8 due to AIDS. (Tr. 399.) He was last employed from January to July 2007, working at the ticket counter
9 and gate for an airline. (Tr. 399, 406.) He testified that he cannot work because of his need for sleep,
10 fatigue, nausea, side effects from medications, and depression. (Tr. 414.) He is tired all the time and has
11 diarrhea. (Tr. 401.) Plaintiff testified that on a normal day, he wakes at 7 a.m., takes two naps of two to
12 three hours each, goes to bed at 9 p.m., and still feels like he has not gotten enough sleep. (Tr. 404.) At
13 least once a week he does not get out of bed at all. (Tr. 411.) Plaintiff had three surgeries on his cervical
14 spine in 2007. (Tr. 401.) He still needs physical therapy but his neck has been okay for the most part
15 since the last surgery. (Tr. 402.) Plaintiff sometimes has numbness in his hands, his grip is weak and he
16 can feel tightness in his neck when he turns his head. (Tr. 407-08.) He uses an icepack, heating pad or
17 soaks in the tub to relieve neck pain. (Tr. 410.) Plaintiff testified he has had depression since 2001 and
18 he was taking medication for depression at the time of the hearing. (Tr. 402-03.)

19 **STANDARD OF REVIEW**

20 Congress has provided a limited scope of judicial review of a Commissioner's decision. 42
21 U.S.C. § 405(g). A Court must uphold the Commissioner's decision, made through an ALJ, when the
22 determination is not based on legal error and is supported by substantial evidence. *See Jones v. Heckler*,
23 760 F. 2d 993, 995 (9th Cir. 1985); *Tackett v. Apfel*, 180 F. 3d 1094, 1097 (9th Cir. 1999). "The
24 [Commissioner's] determination that a claimant is not disabled will be upheld if the findings of fact are
25 supported by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9th Cir. 1983) (citing 42
26 U.S.C. § 405(g)). Substantial evidence is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d
27 1112, 1119 n. 10 (9th Cir. 1975), but less than a preponderance. *McAllister v. Sullivan*, 888 F.2d 599,
28 601-602 (9th Cir. 1989); *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d 573, 576 (9th

1 Cir. 1988). Substantial evidence “means such evidence as a reasonable mind might accept as adequate
 2 to support a conclusion.” *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (citations omitted). “[S]uch
 3 inferences and conclusions as the [Commissioner] may reasonably draw from the evidence” will also be
 4 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965). On review, the Court considers the record
 5 as a whole, not just the evidence supporting the decision of the Commissioner. *Weetman v. Sullivan*, 877
 6 F.2d 20, 22 (9th Cir. 1989) (quoting *Kornock v. Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

7 It is the role of the trier of fact, not this Court, to resolve conflicts in evidence. *Richardson*, 402
 8 U.S. at 400. If evidence supports more than one rational interpretation, the Court may not substitute its
 9 judgment for that of the Commissioner. *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579
 10 (9th Cir. 1984). Nevertheless, a decision supported by substantial evidence will still be set aside if the
 11 proper legal standards were not applied in weighing the evidence and making the decision. *Browner v.*
 12 *Sec’y of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). Thus, if there is substantial
 13 evidence to support the administrative findings, or if there is conflicting evidence that will support a
 14 finding of either disability or nondisability, the finding of the Commissioner is conclusive. *Sprague v.*
 15 *Bowen*, 812 F.2d 1226, 1229-30 (9th Cir. 1987).

16 SEQUENTIAL PROCESS

17 The Social Security Act (the “Act”) defines “disability” as the “inability to engage in any
 18 substantial gainful activity by reason of any medically determinable physical or mental impairment which
 19 can be expected to result in death or which has lasted or can be expected to last for a continuous period
 20 of not less than twelve months.” 42 U.S.C. §§ 423 (d)(1)(A), 1382c (a)(3)(A). The Act also provides
 21 that a plaintiff shall be determined to be under a disability only if his impairments are of such severity
 22 that plaintiff is not only unable to do his previous work but cannot, considering plaintiff’s age, education
 23 and work experiences, engage in any other substantial gainful work which exists in the national economy.
 24 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B). Thus, the definition of disability consists of both medical
 25 and vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001).

26 The Commissioner has established a five-step sequential evaluation process for determining
 27 whether a claimant is disabled. 20 C.F.R. §§ 404.1520, 416.920. Step one determines if he or she is
 28 engaged in substantial gainful activities. If the claimant is engaged in substantial gainful activities,

1 benefits are denied. 20 C.F.R. §§ 404.1520(a)(4)(I), 416.920(a)(4)(I).

2 If the claimant is not engaged in substantial gainful activities, the decision maker proceeds to step
3 two and determines whether the claimant has a medically severe impairment or combination of
4 impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If the claimant does not have a severe
5 impairment or combination of impairments, the disability claim is denied.

6 If the impairment is severe, the evaluation proceeds to the third step, which compares the
7 claimant's impairment with a number of listed impairments acknowledged by the Commissioner to be
8 so severe as to preclude substantial gainful activity. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii);
9 20 C.F.R. § 404 Subpt. P App. 1. If the impairment meets or equals one of the listed impairments, the
10 claimant is conclusively presumed to be disabled.

11 If the impairment is not one conclusively presumed to be disabling, the evaluation proceeds to
12 the fourth step, which determines whether the impairment prevents the claimant from performing work
13 he or she has performed in the past. If plaintiff is able to perform his or her previous work, the claimant
14 is not disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At this step, the claimant's residual
15 functional capacity ("RFC") assessment is considered.

16 If the claimant cannot perform this work, the fifth and final step in the process determines whether
17 the claimant is able to perform other work in the national economy in view of his or her residual
18 functional capacity and age, education and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),
19 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

20 The initial burden of proof rests upon the claimant to establish a *prima facie* case of entitlement
21 to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v. Apfel*, 172 F.3d
22 1111, 1113 (9th Cir. 1999). The initial burden is met once the claimant establishes that a physical or
23 mental impairment prevents him from engaging in his or her previous occupation. The burden then
24 shifts, at step five, to the Commissioner to show that (1) the claimant can perform other substantial
25 gainful activity and (2) a "significant number of jobs exist in the national economy" which the claimant
26 can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th Cir. 1984).

ALJ'S FINDINGS

At step one of the sequential evaluation process, the ALJ found plaintiff has not engaged in substantial gainful activity since November 2, 2005, the alleged onset date. (Tr. 18.) At step two, the ALJ found plaintiff's impairments of HIV/AIDS, major depressive disorder and degenerative disc disease of the cervical spine are severe. (Tr. 19.) At step three, the ALJ found that plaintiff does not have an impairment or combination of impairments that meets or medically equals one of the listed impairments in 20 C.F.R. Part 404, Subpt. P, App. 1. (Tr. 22.) The ALJ then determined:

[C]laimant has the residual functional capacity to perform less than the full range of light work because of postural, manipulative, environmental and vocational nonexertional limitations. He can lift and carry 10 pounds frequently and 20 pounds occasionally. He can sit up to six hours in an eight-hour workday and he can stand and walk for up to six hours in an eight-hour workday with normal breaks. He can occasionally climb stairs and ramps, stoop, kneel, crouch, crawl, and reach overhead. He should never climb ladders, ropes, or scaffolds and he should avoid vibration. He should have superficial interactions with the general public and he can interact with co-workers for work-related activities.

(Tr. 22.) At step four, the ALJ found plaintiff is unable to perform any past relevant work. (Tr. 24.) After taking into account plaintiff's age, education, work experience, residual functional capacity and the testimony of a vocational expert, the ALJ determined there are jobs that exist in significant numbers in the national economy that the plaintiff can perform. (Tr. 25.) Thus, the ALJ concluded plaintiff has not been under a disability, as defined in the Social Security Act, from November 2, 2005 through the date of the decision. (Tr. 25.)

ISSUES

The question is whether the ALJ's decision is supported by substantial evidence and free of legal error. Specifically, plaintiff asserts the ALJ erred by: (1) failed to fully develop the record; and (2) improperly determining that plaintiff does not meet a listed impairment (Ct. Rec. 15 at 7-9). Defendant argues the ALJ: (1) properly found plaintiff does not meet a listing; and (2) adequately developed the record. (Ct. Rec. 17 at 7-15.)

DISCUSSION

1. Duty to Develop the Record

Plaintiff argues the record is insufficient for the ALJ to reach a properly supported determination regarding plaintiff's degenerative disc disease of the cervical spine. (Ct. Rec. 15 at 7.) In Social Security cases, the ALJ has a special duty to develop the record fully and fairly and to ensure that the claimant's interests are considered, even when the claimant is represented by counsel. *Tonapetyan v. Halter*, 242 F.3d 1144, 1150 (9th Cir. 2001); *Brown v. Heckler*, 713 F.2d 441, 443 (9th Cir.1983). The regulations provide that the ALJ may attempt to obtain additional evidence when the evidence as a whole is insufficient to make a disability determination, or if after weighing the evidence the ALJ cannot make a disability determination. 20 C.F.R. § 404.1527(c)(3); *see also* 20 C.F.R. 404.1519a. Ambiguous evidence, or the ALJ's own finding that the record is inadequate to allow for proper evaluation of the evidence, triggers the ALJ's duty to "conduct an appropriate inquiry." *Smolen v. Chater*, 80 F.3d 1273, 1288 (9th Cir. 1996); *Armstrong v. Comm'r of Soc. Sec. Admin.*, 160 F.3d 587, 590 (9th Cir.1998). An ALJ's duty to develop the record further is triggered only when there is ambiguous evidence or when the record is inadequate to allow for proper evaluation of the evidence. *Tonapetyan*, 242 F.3d at 1150.

The ALJ thoroughly reviewed the evidence relating to plaintiff's severe back impairment. (Tr. 20-21.) In April 2007, plaintiff had neck surgery to relieve symptoms of spinal stenosis at C5-6. (Tr. 307.) Initially, plaintiff was doing well and was recovering from surgery without much difficulty. By June 2007, plaintiff had returned to light duty work at the airline. (Tr. 320.) In September 2007, Plaintiff reported that his cervical problems had been resolved until about two months prior. (Tr. 324.) He was experiencing increased numbness and tingling and a dead feeling in both hands. (Tr. 324.) On October 1, 2007, Plaintiff underwent a cervical laminoplasty. (Tr. 338, 342.) After some initial difficulty with a post operative infection of the wound, plaintiff reported that "the reason he had the surgery, numbness in his hands and pain in his neck with dizziness has resolved and he feels much better." (Tr. 346.) By the end of October 2007, plaintiff was showing adequate healing and it was recommended that he restart a reconditioning program and physical

1 therapy. (Tr. 349.) He was told to avoid lifting over 15 to 20 pounds. (Tr. 349.)

2 In January 2008, plaintiff was examined by Dr. Neil Barg, an infectious disease specialist.
3 (Tr. 356-58.) Dr. Barg diagnosed AIDS, hypertension, C3-C4 laminoplasty, and depression. (Tr.
4 357.) He assessed plaintiff's AIDS and hypertension as mildly severe, plaintiff's depression as
5 moderately severe, and plaintiff's condition post laminoplasty as markedly severe, causing very
6 significant interference with plaintiff's ability to perform basic work-related functions. (Tr. 357.) Dr.
7 Barg indicated plaintiff's overall work level was severely limited, defined as unable to lift at least 2
8 pounds or unable to stand and/or walk. (Tr. 357.) Dr. Barg also noted restricted ability to bend,
9 climb, pull, push and reach. (Tr. 357.)

10 Plaintiff argues the record is incomplete because there is no assessment of plaintiff's
11 exertional capacities post-surgery. (Ct. Rec. 15 at 7.) As the ALJ pointed out, Dr. Barg indicated that
12 plaintiff was significantly limited during the process of healing from his last back surgery. (Tr. 21,
13 356.) This suggests that plaintiff's limitations would decrease as he continued to heal. The ALJ also
14 pointed out that Dr. Barg's opinion is a fill-in-the-blank assessment form which is not supported by
15 examination notes, medical signs or clinical findings. (Tr. 23.) Opinions on a check-box form or
16 form reports which do not contain significant explanation of the basis for the conclusions may be
17 accorded little or no weight. *See Crane v. Shalala*, 76 F.3d 251, 253 (9th Cir. 1996); *Johnson v.*
18 *Chater*, 87 F.3d 1015, 1018 (9th Cir. 1996). The ALJ therefore reasonably gave less weight to Dr.
19 Barg's opinion regarding plaintiff's limitations.

20 The ALJ observed that no evidence of additional follow-up or post-operative surgery was
21 offered by plaintiff between the date of the hearing and the date of the decision. (Tr. 21.) The ALJ
22 concluded that plaintiff's cervical spine surgeries have been successful in relieving symptoms. (Tr.
23 23.) Additionally, in April 2008, Dr. Rowe noted that plaintiff runs five miles every day and works
24 out three times per week. (Tr. 361.) Plaintiff listed his leisure activities as going to the gym and
25 running. (Tr. 361.) Plaintiff's neck surgeries were listed as part of his medical history, but plaintiff
26 identified his primary medical problems as "full-blown AIDS" and chronic fatigue. (Tr. 360.)
27 Plaintiff testified that his neck has been okay "for the most part" since his last surgery. (Tr. 402.)
28 When asked how his neck still affected him, plaintiff testified that he still needs physical therapy and

1 that he has to be careful with lifting. (Tr. 402.) The ALJ also made an adequately supported
 2 credibility determination that plaintiff's symptoms do not appear to be as fatiguing and limiting as
 3 alleged, and plaintiff does not challenge the credibility finding. (Tr. 23.) All of these factors suggest
 4 that plaintiff had few limitations after his back surgery.

5 The record before the ALJ was neither ambiguous nor inadequate to allow for proper
 6 evaluation of the evidence. *See Mayes v. Massanari*, 276 F.3d 453, 460 (9th Cir. 2001). An ALJ has
 7 broad latitude in ordering a consultative examination. *Reed v. Massanari*, 270 F.3d 838, 842 (9th Cir.
 8 2001). The government is not required to bear the expense of an examination for every claimant. *See*
 9 20 C.F.R. § 404.1517. In this case, plaintiff has not identified any ambiguity or inadequacy in the
 10 record requiring an additional consultative examination. Therefore, the ALJ did not err.

11 **2. Listing 14.08**

12 Plaintiff argues he meets the criteria for disability under listing 14.08(N) of 20 C.F.R. Part
 13 404, Subpart P, Appendix 1 (20 C.F.R. 416.920(d)). If plaintiff meets the listed criteria for disability,
 14 he is presumed to be disabled. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). The ALJ indicated
 15 that he considered plaintiff's severe impairment of HIV and compared plaintiff's impairment to the
 16 criteria for listing 14.08, the listing for human immunodeficiency virus or HIV. (Tr. 22.) The HIV
 17 listing criteria includes:

18 Repeated (as defined in 14.00D8) manifestations of HIV infection . . .
 19 resulting in significant, documented symptoms or signs (e.g., fatigue,
 20 fever, malaise, weight loss, pain, night sweats) and one of the following
 21 at the marked level (as defined in 14.00D8):

- 22 1. Restrictions of activities of daily living; or
- 23 2. Difficulties in maintaining social functioning; or
- 24 3. Difficulties in completing tasks in a timely manner due to
 25 deficiencies in concentration, persistence or pace.

26 20 C.F.R. § 404 Subpt. P App. 1, 14.08N. The ALJ concluded that plaintiff's medically severe and
 27 non-severe impairments, both singly and in combination, do not meet or medically equal the requisite
 28 criteria for any listed impairments as set forth in the regulations, including listing 14.08. The ALJ
 specifically found that although plaintiff's HIV is a severe impairment, the allegation of development
 of AIDS is given no weight as it is no way corroborated or supported by any signs or findings in the
 record. (Tr. 20.)

1 Plaintiff argues that he has a documented history of chronic fatigue and malaise associated
 2 with HIV. (Ct. Rec. 15 at 9.) Plaintiff's fatigue and malaise must constitute a repeated manifestation
 3 of HIV infection resulting significant, documented symptoms or signs in order to meet the
 4 requirements of listing 14.08N. As used in 14.08N, "repeated" means the conditions occur with the
 5 following frequency:

- 6 1. An average of three times a year, or once every four months, each lasting two
- 7 2. If the conditions do not last for two weeks but occur substantially more
- 8 3. If they occur less often than an average of three times a year or once every four

9 *See* 20 C.F.R. § 404 Subpt. P App. 1, 14.00D8. Plaintiff asserts his testimony regarding fatigue is
 10 "wholly consistent with what he told a variety of medical providers." (Ct. Rec. 15 at 9.) Plaintiff
 11 testified that he has severe fatigue and is "pretty much tired all the time." (Tr. 401.) He said he has
 12 had fatigue since the time he first saw his treating physician, Dr. Tucker in 2005. (Tr. 404.) He
 13 thinks he is not able to work at any job in part because of his need for sleep and fatigue. (Tr. 414.)

14 Plaintiff points to the report of examining psychologist Dr. Goodwin and the notes of treating
 15 physician Dr. Tucker in support of his allegations of fatigue. (Ct. Rec. 15 at 3-4, Tr. 166, 263.) In
 16 December 2005, Dr. Goodwin recorded plaintiff's reports of variability in sleep quantity, difficulty
 17 getting to sleep, difficulty staying asleep, early morning awakening and difficulty staying awake. (Tr.
 18 263.) Dr. Goodwin noted insomnia and hypersomnia may be present. (Tr. 263.) Dr. Goodwin's note
 19 to plaintiff's treating physician, Dr. Tucker, recommended starting a sleep aid medication for
 20 plaintiff's sleep deficit. (Tr. 353.) Dr. Tucker prescribed a nighttime sedating agent at plaintiff's next
 21 appointment. (Tr. 211.) In February 2006, Dr. Tucker indicated no repeated manifestations of HIV
 22 infection were present, including fatigue or malaise. (Tr. 206.) This suggests that the fatigue
 23 identified by Dr. Goodwin had resolved after treatment.

24 Plaintiff cites a note by Dr. Tucker dated March 14, 2006 which states plaintiff "appears
 25 fatigued." (Tr. 166, Ct. Rec. 15 at 3.) However, Dr. Tucker's notes two days later, on March 16,
 26 2006 indicate plaintiff "appears well" and does not mention fatigue. (Tr. 165.) In October 2006, Dr.
 27 Tucker noted plaintiff was without symptoms except for intermittent diarrhea and abdominal
 28 discomfort. (Tr. 276.) In January 2007, Dr. Tucker indicated plaintiff's HIV was asymptomatic. (Tr.

289.) In April 2007, Dr. Tucker noted plaintiff was doing “basically well” and in May 2007, Dr. Tucker noted plaintiff reported doing well and opined that plaintiff was doing generally quite well. (Tr. 306, 311, 312, 315.) Dr. Tucker’s records are not consistent with plaintiff’s testimony and do not support a finding of repeated manifestation of HIV in the form of fatigue or malaise as defined by the regulations.

Plaintiff also points to Dr. Rowe’s March 2008 report which mentions that plaintiff typically experiences one and a half to two hours of insomnia before getting to sleep, wakes feeling tired, and gets his most restful sleep during the day. (Tr. 361.) Plaintiff told Dr. Rowe his greatest barrier to work was his fatigue and having to frequently take naps. (Tr. 361.) Dr. Rowe observed plaintiff appeared fatigued toward the end of the testing. (Tr. 361.) While this is generally consistent with plaintiff’s testimony, it does not constitute a repeated manifestation of HIV resulting in significant, documented fatigue or malaise as required by listing 14.08N and 14.00D8. Dr. Rowe’s report does not contain any information about the duration or frequency of the fatigue described by plaintiff. Dr. Rowe’s report alone does not constitute evidence sufficient to meet the requirements of 14.08N as defined by 14.00D8.

Even if plaintiff’s fatigue meets the requirements of listing 14.08N and 14.00D8, plaintiff must also show a marked restriction in activities of daily living, in difficulties in maintaining social functioning, or in difficulties in completing tasks in a timely manner due to deficiencies in concentration, persistence or pace. 20 C.F.R. § 404 Subpt. P App. 1, 14.08N. The term “marked” as a standard for measuring the degree of functional limitation means “more than moderate, but less than extreme.” 20 C.F.R. § 404 Subpt. P App. 1, 14.00D8. An individual need not be totally precluded from performing an activity to have a marked limitation, as long as the degree of limitation seriously interferes with the ability to function independently, appropriately, and effectively. *Id.* The ALJ found that even with drug and alcohol abuse, and after taking into account all of the medical and psychological evidence of record, plaintiff’s restrictions in activities of daily living are mild, difficulties in maintaining social functioning are moderate, and difficulties in maintaining concentration, persistence and pace are moderate. (Tr. 22.)

Plaintiff argues he established marked difficulties in completing tasks in a timely manner due

1 to deficiencies in concentration, persistence and pace. (Ct. Rec. 15 at 8-9.) Plaintiff points to the
2 assessment of Dr. Goodwin, an examining psychologist who opined that plaintiff has a marked
3 limitation in the ability to respond appropriately to and tolerate the pressure and expectations of a
4 normal work setting. (Tr. 257.) Plaintiff argues this limitation is analogous to a limitation in
5 concentration, persistence and pace. (Ct. Rec. 15 at 8-9.) As defendant points out, the limitation on
6 the ability to respond appropriately to and tolerate the pressure and expectations of a normal work
7 setting is a social limitation, which is a separate category of limitation from concentration, persistence
8 and pace. (Ct. Rec. 17 at 12-13.) Furthermore, Dr. Goodwin specifically stated, "No apparent
9 deficits were evidenced in attention and concentration." (Tr. 263.)

10 Additionally, the ALJ gave little weight to Dr. Goodwin's opinion. (Tr. 21.) In disability
11 proceedings, a treating physician's opinion carries more weight than an examining physician's
12 opinion, and an examining physician's opinion is given more weight than that of a non-examining
13 physician. *Benecke v. Barnhart*, 379 F.3d 587, 592 (9th Cir. 2004); *Lester v. Chater*, 81 F.3d 821, 830
14 (9th Cir. 1995). If the treating or examining physician's opinions are not contradicted, they can be
15 rejected only with clear and convincing reasons. *Lester*, 81 F.3d at 830. If contradicted, the opinion
16 can only be rejected for "specific" and "legitimate" reasons that are supported by substantial evidence
17 in the record. *Andrews v. Shalala*, 53 F.3d 1035, 1043 (9th Cir. 1995). The consistency of a medical
18 opinion with the record as a whole is a relevant factor in evaluating a medical opinion. *Lingenfelter*
19 *v. Astrue*, 504 F.3d 1028, 1042 (9th Cir. 2007); *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). An
20 ALJ may discredit treating physicians' opinions that are conclusory, brief, and unsupported by the
21 record as a whole. *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1195 (9th Cir. 2004). The
22 ALJ gave little weight to Dr. Goodwin's opinion because it is not consistent with the balance of the
23 record. (Tr. 21.) The ALJ found that the opinions of Dr. Rowe and Dr. Tucker regarding plaintiff's
24 limitations are consistent with the opinion of the state consulting psychologist who assessed some
25 moderate limitations but no marked limitations. (Tr. 21, 192-94.) Dr. Rowe assessed only mild and
26 moderate limitations, including a moderate limitation in the ability to respond appropriate to usual
27 work situations and to changes in a routine work setting. (Tr. 371-73.) Plaintiff does not explain
28 how the ALJ erred in rejecting Dr. Goodwin's opinion, and the court concludes the ALJ's reasoning

1 is legally sufficient and supported by substantial evidence. As a result, Dr. Goodwin's marked
2 limitations were properly rejected by the ALJ and cannot form the basis for a finding that plaintiff
3 meets or equals the listing.

4 Plaintiff also suggests the ALJ should have obtained the opinion of a psychological expert
5 regarding whether plaintiff meets or equals listing 14.08. (Ct. Rec. 15 at 9.) Plaintiff has the burden
6 of demonstrating disability under the listings. *Roberts v. Shalala*, 66 F.3d 179, 182 99th Cir. 1995);
7 *see Sullivan v. Zebley*, 493 U.S. 521, 530-31 (1990) (burden is on the claimant to show that his
8 impairment meets all of the specified medical criteria for a listing, or present medical findings equal
9 in severity to all the criteria for the one most similar listed impairment); *Johnson v. Barnhart*, 390
10 F.3d 1067, 1070 (8th Cir. 2004) ("The burden of proof is on the plaintiff to establish this his or her
11 impairment meets or equals a listing."). The administrative law judge is responsible for deciding the
12 ultimate legal question about whether a listing is met or equaled. S.S.R. 96-6p. The ALJ made a
13 thorough discussion of the evidence which adequately identifies the basis for the step three finding.
14 *See Gonzalez v. Sullivan*, 914 F.2d 1197, 1201 (9th Cir. 1990) ("It is unnecessary to require the [ALJ],
15 as a matter of law, to state why a claimant failed to satisfy every different section of the Listing of
16 Impairments. The [ALJ's] four page 'evaluation of the evidence' is an adequate statement of the
17 'foundations on which the ultimate factual conclusions are based'"); *see also Key v. Heckler*, 754
18 F.2d 1545, 1549 n. 2 (9th Cir. 1985) ("the ALJ examined the medical reports submitted by the various
19 physicians and concluded that the preponderance of the evidence did not establish the existence of the
20 findings necessary to support a showing of disability under the Listing of Impairments"). In this case,
21 the ALJ thoroughly discussed the evidence which formed the basis of the step three finding. Plaintiff
22 did not meet the burden of showing he meets or equals the criteria in listing 14.08N.

23 Even so, policy requires that the judgment of a physician or psychologist designated by the
24 Commissioner on the issue of equivalence on the evidence be received into the record to be weighted
25 appropriately. S.S.R. 96-6p. The requirement to receive expert opinion evidence into the record may
26 be satisfied by the opinion of a state agency medical or psychological consultant on the issue of
27 equivalence. *See* S.S.R. 96-6p. The ALJ must obtain an updated medical opinion from a medical
28 expert in two circumstances:

1. When no additional medical evidence is received, but in the ALJ's judgment the record suggests that a judgment of equivalence may be reasonable;
2. When additional medical evidence is received that in the opinion of the ALJ may change the state agency medical or psychological consultant's finding that the impairment is not equivalent in severity to any impairment in the Listing of Impairments.

S.S.R. 96-6p. In this case, an opinion from a state consulting physician dated February 13, 2006 and an opinion from a state consulting psychologist dated February 14, 2006 are part of the record. (Tr. 178-203.) The consulting physician stated plaintiff's symptoms were partially credible, "however, he has none of the qualifying criteria for Listing 14.08." (Tr. 203.) Neither of the circumstances requiring an updated opinion from a medical expert applies here. Additional medical and psychological evidence was received after the February 2006 consulting opinions, but the ALJ concluded the updated records of Dr. Tucker and Dr. Rowe are consistent with those findings. (Tr. 21.) As discussed above, Dr. Tucker described plaintiff's HIV as "asymptomatic" and Dr. Rowe assessed only mild and moderate findings. The later evidence would not change the opinions of the state consulting professionals because it is consistent with their earlier findings. Thus, the ALJ was not required to obtain an additional medical expert opinion on the issue of equivalence.

The ALJ's determination that plaintiff did not meet listing 14.08 is supported by substantial evidence. It is the ALJ's duty to resolve conflicts and ambiguity in the medical and non-medical evidence. *See Morgan v. Commissioner*, 169 F.3d 595, 599-600 (9th Cir. 1999). It is not the role of the court to second-guess the ALJ. *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984). The court must uphold the ALJ's decision where the evidence is susceptible to more than one rational interpretation. *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). Plaintiff did not demonstrate that the ALJ erred by failing to find that he meets the requirement of repeated demonstrations of HIV infections through documented symptoms, nor did plaintiff show that the ALJ's findings of mild and moderate limitations in plaintiff's activities of daily living, social functioning, and concentration, persistence and pace are inappropriate. The ALJ was not required to obtain an updated consultative examination because later findings are consistent with the consultative opinions in the record. The ALJ's findings are supported by substantial evidence in the record and the ALJ did not err.

CONCLUSION

Having reviewed the record and the ALJ's findings, this court concludes the ALJ's decision is supported by substantial evidence and is not based on error.

Accordingly,

IT IS ORDERED:

1. Defendant's Motion for Summary Judgment (**Ct. Rec. 16**) is **GRANTED**.
2. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 14**) is **DENIED**.

The District Court Executive is directed to file this Order and provide a copy to counsel for plaintiff and defendant. Judgment shall be entered for defendant and the file shall be **CLOSED**.

DATED September 22, 2010

S/ JAMES P. HUTTON
UNITED STATES MAGISTRATE JUDGE